IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 55931-1-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
DARRYL M. WILSON,	)	Unpublished Opinion
	)	
Appellant.	)	FILED: July 31, 2006

PER CURIAM. After expressing his apparent dissatisfaction with defense counsel, Darryl Wilson informed the trial court, "I want to dismiss this guy right now." Despite this request, Wilson was represented by the same attorney throughout his trial and sentencing proceedings. Wilson now asks us to decide on appeal whether he was denied his constitutional right of self-representation. Given the relevant facts in this case and the nature of our review, we hold he was not. Nor do the other issues raised by either Wilson or his attorney establish grounds for reversal. Accordingly, we affirm.

FACTS

On the evening of December 2, 2004, the manager of the Munson Motel in Seattle observed Wilson and L.M. standing outside a unit where they were staying. L.M. was dressed inappropriately and appeared quite disoriented. Concerned about her condition, the manager called 911.

Upon arriving at the scene, Officer Wiebke met with L.M., who was dressed only

in a shirt and appeared disoriented. After L.M. indicated that her husband had hit her, the police officer broadcast a description of the suspect and took photographs of her injuries. Given L.M.'s account of what happened and the nature of her injuries, Officer Wiebke called for emergency medical assistance. During a subsequent meeting with Lieutenant Iranon of the Seattle Fire Department, L.M. complained of pain to her nose and back and said she had been beaten with a cane. She had a bloody nose and rows of welts across her back. L.M. also gave a statement to Detective Bundy with the Seattle Police Department. A metal cane was recovered from the motel room L.M. shared with Wilson. L.M. was transported to a nearby hospital for medical care and treatment. The State charged Wilson with one count of second degree assault, domestic violence, in connection with the December 2, 2004, incident and one count of third degree assault, domestic violence, for a separate incident involving the same parties on November 11, 2004.

At the jury trial, L.M. did not testify. Over defense objection on hearsay grounds, the out-of-court statements L.M. made to the fireman, the police, the emergency room physician, and a social worker at the hospital were admitted into evidence. Photographs of L.M.'s injuries were also admitted into evidence. In addition to the welts on L.M.'s back, the emergency room physician testified that L.M. had fractures of her nose and a bone in her shoulder. During the examination, L.M. said that her boyfriend had attacked her with a cane. The physician testified that L.M.'s injuries were consistent with being beaten with a cane. The social worker stated that she interviewed L.M., who still had blood on her face, shortly after arriving at the hospital

and advised her that the information gathered in the report would be used for subsequent medical diagnosis and treatment. According to the social worker, L.M. told her that Wilson had assaulted her with a cane. The social worker testified about the importance of developing a "safety plan" so that L.M. would not be exposed to further harm when she was released from the hospital. The State also called another police officer who had responded to the 911 call and arrested Wilson a few blocks from the motel. Sergeant Hay testified that Wilson asked him about whether he was being stopped because of what had happened back at the motel and said, "my wife is crazy." Other testimony was presented about the November 11, 2004 incident.

Although Wilson did not take the stand, neither did he sit silently throughout the trial. At several points during the proceedings, Wilson called prosecution witnesses liars or stated they were lying. The trial court repeatedly admonished Wilson to remain quiet, and Wilson repeatedly disregarded the court's directive. The jury found Wilson guilty of second degree assault, domestic violence and not guilty of the third degree assault charge. The jury also returned a special verdict finding that Wilson was armed with a deadly weapon at the time he committed the assault.

At sentencing, the trial court used an offender score of five to impose a standard range sentence of 41 months of total confinement. This appeal followed.

DECISION

Wilson first contends that he was denied his constitutional right to represent himself. Because the trial court failed to consider his request to proceed pro se, Williams argues that his assault conviction should be reversed and the matter

remanded for a new trial. We disagree.

In the midst of a discussion of certain pretrial matters, Wilson told the court, "I want to dismiss this guy right now." The following colloquy then took place:

> THE COURT: Well, I'm actually not going to let you do that. He is your attorney.
> THE DEFENDANT: Well, don't worry about it. I will get it done.
> THE COURT: No. Sir, you need to stay here. We are doing trial now, and Mr. Hammerstad will stand to represent you. You need to work with him.
> THE DEFENDANT: He is not my legal attorney. I don't care what he is talking about.
> THE COURT: Well, he is your attorney.
> THE DEFENDANT: Not right now he is not.
> THE COURT: Well, he is unless I say otherwise, and we need to get going on this trial and go through it.

Verbatim Report of Proceedings (VRP) (Mar. 1, 2005) at 29.

Our review is limited to determining whether Wilson made a knowing and intelligent waiver of his right to counsel. Under the state and federal constitutions, criminal defendants may waive their right to be represented by counsel and choose instead to represent themselves at trial and conduct their own defense. State v. Woods, 143 Wn.2d 561, 585, 23 P.3d 1046 (2001); State v. Silva, 107 Wn. App. 605, 617–18, 27 P.3d 663 (2001). To waive the right of legal representation, the defendant's request to proceed pro se must be stated unequivocally and made in a timely fashion. State v. Vermillion, 112 Wn. App. 844, 851, 51 P.3d 188 (2002).

Although it is clear that Wilson wanted to summarily fire his attorney, his request is not unequivocal that he also wished to represent himself pro se. A defendant's desire to fire his attorney does not, by itself, constitute an unequivocal request for self-representation. State v. Garcia, 92 Wn.2d 647, 655, 600 P.2d 1010

(1979). Even if we were inclined to treat Wilson's demand as timely made,[1] the request can hardly be viewed as an unequivocal assertion of his right to self-representation. In his various comments to the court, Wilson never once mentioned his right to self-representation. Because Wilson never made the required request, he was not denied his constitutional right to represent himself. Garcia, 92 Wn.2d at 655.

Wilson next challenges the following remarks the prosecutor made during closing argument:

> That's not all you can consider when you go back to the jury room. You can also consider the defendant. You can consider the way he sat here during the trial. You can consider the way he acted. You can take that into consideration in determining whether or not these things really happened.

VRP (Feb. 7, 2005) at 20.

He contends these remarks so prejudiced him that he was denied his right to a fair trial. We disagree. "A defendant's right to a fair trial is denied when the prosecutor makes improper comments and there is a substantial likelihood that the comments affected the jury's decision." State v. Thompson, 73 Wn. App. 654, 663, 870 P.2d 1022 (1994). Where improper argument is alleged, the defendant bears the burden of showing the impropriety of the argument as well as its prejudicial effect. State v. McKenzie, 157 Wn.2d 44, __ P.3d __ (2006). Alleged misconduct must be viewed "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given." State v. Graham, 59 Wn. App. 418, 428, 798 P.2d 314 (1990).

[1] Where a request to proceed pro se is made as the trial "is about to commence," then "the existence of the right depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter[.]" Vermillion, 112 Wn. App. at 855 (quoting State v. Fritz, 21 Wn. App. 354, 361, 585 P.2d 173 (1978)).

Wilson contends that the prosecutor's challenged remarks impermissibly drew the attention of the jury to his courtroom demeanor. Having asserted his right not to testify, Wilson argues that his courtroom demeanor was not evidence the jury could properly consider. Thus, Wilson argues his conviction should be reversed. We again disagree.

Comments that encourage the jury to render a verdict on facts not in evidence are improper. State v. Stover, 67 Wn. App. 228, 230–31, 834 P.2d 671 (1992). A prosecutor has "no right to call to the attention of the jury matters or considerations which the jurors have no right to consider." State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956). Reversal is not required, however, unless there is a substantial likelihood that the improper comments, remarks, or argument affected the jury's verdict. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

The Washington Supreme Court has recognized that "it may be improper to comment on a defendant's demeanor so as to invite a jury to draw a negative inference about the defendant's character." State v. Smith, 144 Wn.2d 665, 679, 30 P.3d 1245, 39 P.3d 2994 (2001); see also State v. Klok, 99 Wn. App. 81, 85, 992 P.2d 1039 (2000). Wilson relies on U.S. v. Schuler, 813 F.2d 978 (9th Cir. 1987), and U.S. v. Pearson, 746 F.2d 787 (11th Cir. 1984), for the proposition that it is misconduct for a prosecutor to comment on a defendant's courtroom behavior. Those cases, however, are readily distinguishable.

In Schuler, the defendant was charged with threatening the life of the President of the United States. In closing argument, the prosecutor commented on the defendant's laughter during testimony about the threats he made. The Ninth Circuit held that the

defendant's behavior off the witness stand was not relevant "where the defendant in the trial phase asserted his right not to testify and where neither his credibility nor his character were relevant considerations." Schuler 813 F.2d at 981 n.3. And, in Pearson, the defendant was charged with possessing an unregistered silencer and possessing the silencer without a serial number. During closing argument, the prosecutor commented on the defendant's nervousness off the witness stand. The Eleventh Circuit held that "the defendant's behavior off the witness stand in this instance was not evidence subject to comment." Pearson, 746 F.2d at 796 (emphasis added).

While the prosecutor's challenged remarks in this case did invite the jury to consider "the way [Wilson] acted" during the trial, they were not improper. When a defendant chooses not to testify, "the fact of his presence and his nontestimonial behavior in the courtroom [may] not be taken as evidence of his guilt." U.S. v. Carroll, 678 F.2d 1208, 1209 (4th Cir. 1982). Unlike the situations in the cases cited by Wilson, his courtroom behavior was testimonial in nature. During his numerous outbursts, Wilson was commenting on the evidence and in effect attempting to testify.

Considering the primary purpose of a criminal trial, which is to decide the factual question of the defendant's guilt or innocence, "it is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of one another." U.S. v.Robinson, 485 U.S. 25, 33, 108 S. Ct. 864, 99 L. Ed. 2d 23 (1988). When a defendant chooses to testify, a jury must necessarily consider the credibility of the defendant. We see no reason to apply a different rule where, as here, the defendant has repeatedly attacked the veracity of the witnesses against him, albeit off the witness stand.

By calling the motel manager and Sergeant Hay liars, Wilson has placed his own credibility in issue. Therefore, we conclude that it was not improper for the prosecutor to call attention to Wilson's behavior as she did.

Even if we were to hold otherwise, any error did not rise to the level of reversible misconduct. The evidence of guilt was overwhelming. The jury was also instructed that "[t]he only evidence you are to consider consists of the testimony of witnesses and the exhibits admitted into evidence." The jury was further instructed that the attorneys' remarks, statements, and argument are not evidence and to "[d]isregard any remark, statement, or argument that is not supported by the evidence or the law as stated by the court." These instructions made it clear that the jury can determine Wilson's guilt or innocence based solely on "the testimony of witnesses and the exhibits admitted into evidence." The jury is presumed to follow its instructions. While it is true that the trial court overruled a defense objection to the prosecutor's remarks, that ruling did not compound any error because it was made at a sidebar. Nothing suggests the jurors overheard or were otherwise aware of the court's ultimate decision. Considering the closing argument as a whole, the evidence presented at trial, and the instructions given, there was no reversible misconduct.

Wilson also has filed a "Pro-se Defendants Supplemental Brief 10.1[0]," asserting several additional grounds for relief. Wilson challenges the sufficiency of the evidence to support his conviction for second degree assault. Wilson argues that his conviction must be reversed and the charge dismissed. We disagree.

Due process requires the State to prove all elements of the crime beyond a

reasonable doubt. State v. Aver, 109 Wn.2d 303, 310, 745 P.2d 479 (1987). In reviewing a challenge to the sufficiency of the evidence, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). To convict Wilson of second degree assault, the State was required to show that he intentionally assaulted L.M. and thereby recklessly inflicted substantial bodily harm. See RCW 9A. 36.021(1)(a).

Wilson appears to dispute the strength of the State's evidence. When testing the sufficiency of the evidence, however, "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Wilson also relies on letters and affidavits signed by L.M. in which she recants statements she previously gave to police and others. But a reviewing court can only consider matters in the trial record. See State v. Stockton, 97 Wn.2d 528, 530, 647 P.2d 21 (1982) (matters referred to in the brief but not included in the record cannot be considered on appeal). The record here shows that Wilson was identified as the person who beat L.M. with a metal cane. Her injuries, which included broken bones, were clearly serious enough to inflict substantial bodily harm. In viewing this evidence in the light most favorable to the State, we conclude there was sufficient evidence to convict Wilson of second degree assault while armed with a deadly weapon.

Wilson next contends that he was denied his right to confront witnesses against him under the Sixth Amendment and Crawford v. Washington, 541 U.S. 36,

124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), when out-of-court hearsay statements made by L.M. to police were admitted into evidence. Thus, Wilson argues that his conviction should be reversed. We disagree.

The Sixth Amendment confrontation clause guarantees that a person accused of a crime "shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. amend. VI. In Crawford, the United States Supreme Court held that, under the Confrontation Clause of the Sixth Amendment, courts may not admit testimonial statements of an absent witness unless the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine the adverse witness. Crawford, 541 U.S. at 59.

"Under Crawford statements made during police interrogation are testimonial." State v. Moses, 129 Wn. App. 718, 725, 119 P.3d 906 (2005), review denied, 157 Wn.2d 1006 (2006). Even assuming in this case the challenged out-of-court statements to police were all testimonial, any error in admitting the evidence was harmless beyond a reasonable doubt. See State v. Davis, 154 Wn.2d 291, 304, 111 P.3d 844 (2005) (holding that a violation of the confrontation clause is subject to harmless error analysis).

Washington courts apply the "overwhelming untainted evidence test" as the standard for harmless error. In applying this test, we review the properly admitted evidence to determine whether it necessarily points to Wilson's guilt. State v. Palomo, 113 Wn.2d 789, 799, 783 P.2d 575 (1989). A confrontation clause error is harmless if the evidence is overwhelming and the violation so insignificant by comparison that we

are persuaded beyond a reasonable doubt it did not affect the verdict. See State v. Smith, 148 Wn.2d 122, 138–39, 59 P.3d 74 (2002).

Here the testimony by Officer Wiebke and Detective Bundy, while significant, was merely one part of a strong overall case presented by the State. The cumulative testimony of multiple other witnesses corroborated the police officers' testimony that Wilson assaulted L.M. Out-of-court statements made to health care providers and social workers are admissible if made in the course of diagnosis and treatment. Moses, 129 Wn. App. at 729–31. Any error in this case was therefore harmless.

Wilson also challenges the calculation of his offender score. This court reviews the calculation of an offender score de novo. State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994). Wilson appears to argue that the trial court miscalculated his offender score when it used his prior Missouri convictions for "stealing" and assault in the third degree to calculate his offender score. This argument is not supported by the record. The record clearly shows that those convictions were not, in fact, used in calculating Wilson's offender score.

Wilson also contends that the trial court erred by including his 1986 Illinois conviction for aggravated battery. When the defendant's criminal history includes an out-of-state conviction, the State bears the burden of proving that the conviction would be a felony in Washington. State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). Wilson does not dispute his Illinois conviction would be comparable to a class B felony in Washington. Rather, Wilson argues only that the prior conviction has since washed out. For the relevant wash out provisions of RCW 9.94A.525(2) to apply, however,

the defendant must spend at least ten consecutive years "in the community." The record here shows that Wilson was not out of custody and in the community for a ten-year period. We find no error.

Affirmed.

FOR THE COURT:

Coleman, J.

Baker, J.

Cox, J.